Nos. 86, 87 and 88.

Nos. 86, 87, and 88. Of October Term, 1897.

Brf. of Johnson for D. C.

IN THE

Supreme Court of the United States.

Filed March 23, 1898.

OLEOMARGARINE CASES.

George Schollenberger, Plaintiff in Error,
vs.
The Commonwealth of Pennsylvania.
No. 16,101.

George E. Paul, Plaintiff in Error,
vs.
The Commonwealth of Pennsylvania.
No. 16,102.

J. Otis Paul, Plaintiff in Error,
vs.
The Commonwealth of Pennsylvania.
No. 16,103.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

JOHN G. JOHNSON.

Allen, Lane & Scott, Prs., Phila.

OLEOMARGARINE CASES.

SUPREME COURT OF THE UNITED STATES.

October Term, 1897. Nos. 86, 87, 88.

George Schollenberger, Plaintiff in error, vs. *Commonwealth of Pennsylvania.*	No. 86.
George E. Paul, Plaintiff in error, vs. *Commonwealth of Pennsylvania.*	No. 87.
J. Otis Paul, Plaintiff in error, vs. *Commonwealth of Pennsylvania.*	No. 88.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

One of the States of the Union, the Commonwealth of Pennsylvania, is here, contending for its

right to protect its citizens against what, in good faith, its legislature, with no thought of interfering with commerce, or of discriminating against the citizens or manufactures of any other State, has determined to be unwholesome food and deception. The Act, for whose validity we contend, provides a penalty against the sale by any person, whether resident of Pennsylvania or elsewhere, of the article popularly known as "oleomargarine," whether manufactured within or beyond the State borders, which it declares to be unwholesome and to be incapable of being sold under any precautions which will prevent the ultimate consumer from being deceived as to its real nature as a food product. This Act deals with the article, not in the course of its transportation into, or through, the State of Pennsylvania, but after the termination of the transportation, when it is about to be sold to its citizens.

It is not pretended that this legislation is dishonest, or in excess of the power of the body enacting it. In view of the decision of this court, in Powell *vs.* The Commonwealth, 127 U. S., such contention is impossible. It is claimed, however, that in consequence thereof, persons who might otherwise send oleomargarine into Pennsylvania, will be deterred from so doing, because they will be unable to secure a market therefor.

The Act complained of does not prevent, or interfere with, the transportation. It simply forbids the selling of an article which will deceive the

purchaser as to its nature, and which may be injurious to his health.

The only ground upon which it is assailed in this court is, that it interferes with the power, vested exclusively in Congress, to regulate commerce between States and between a State and a foreign country. It would seem that if it be within the power of a State to protect its citizens against articles deceptive or injurious to health, no Act exercising such power can interfere with the Federal power to regulate commerce, as there can be commerce only in what may be dealt in legally.

If the question in controvery could be determined solely by reading the Constitution of the United States, without reference to precedents, we would urge that the power of a State to protect its citizens against deception and injury cannot conflict with the power in Congress, paramount, of course, if a conflict be possible, to regulate trade and commerce; for if the State, in the legitimate exercise of its power, may condemn the sale of an article within its limits, because of its being unwholesome or deceptive, trade or commerce in such article will fail because of the lack of demand. In the absence of a motive to transport an article, there will be no trade therein to regulate. *Qua* such article, the Federal power will not be destroyed, but will merely be dormant, for lack of material upon which it can be exercised. Excessive taxation by any State may interfere with the power

of its citizens to buy luxuries, or necessaries, manufactured in other States, and, *pro tanto*, with the volume of commerce in such articles. Such taxation, however, although to this extent it might be said to interfere, would not clash with the Congressional power to regulate commerce.

It is the undoubted duty of every State, to open every inch of its territory for the transportation of any article which any person may choose to send into, or through, it, from, or to, any other State or country. It would not seem to be its duty, however, to legislate in such way as to promote a sale of any article forbidden, for sanitary or moral reasons, without regard to the place of its origin, to be sold within its borders. A State would not seem to have abandoned its power to protect its citizens against unwholesome and deceptive articles because it gave to the Congress of the Union, into which it entered, the power to regulate transportation into, and through, it.

Of course, it would be the duty of this court to do what it has ever fearlessly done, viz., to prevent any State, with a real purpose to discriminate against the products and manufactures of another State, from legislating in bad faith. The Federal power would be most delusive and inefficient, if the States of the Union would be permitted to interfere therewith, by legislation enacted with a declared legitimate purpose, if really dictated by another, and a sinister, one.

The decisions of this court show with what vigilant intelligence it has guarded the Union against improperly encroaching legislation. Discrimination against the manufactures or products of another State, however disguised, has never here escaped detection and condemnation.

Viewing the question in controversy by the light of the Constitution, unaffected by precedents, we might argue that the power of the State to protect its citizens in their health, and against deception, is subordinate to nothing. It must be exercised *bona fide;* but, thus exercised, it is a reserved power, unaffected by the grant to Congress of the right to regulate commerce, which is only exercisable upon such trade and commerce as can be conducted between States exercising in good faith their reserved powers.

Of course, however, the present dispute cannot be settled by reading the Constitution of the United States, unaffected by precedents, and it is not intended by the counsel appearing for the Commonwealth of Pennsylvania to rest its case upon any such reading. Counsel must expect that this court will read the Constitution by the light of the context furnished by its past decisions. The court itself, however, will determine to what extent such context will control it. Fortunately, all the crucial points have been discussed by judges, as well those who remain, as those who have gone, with a force of reasoning and with a wealth of learning, that

render it impossible for counsel, even if at liberty so to do, to advance, in the slightest degree, the discussion of points embodied in former decisions.

Where titles and property rights have been acquired upon the faith of past decisions, they should be protected by the doctrine of "*stare decisis;*" but no such doctrine, where great Federal questions are involved, should prevail. If, by any decision in the past, the power of a State has been unduly cramped, "*stare decisis*" is an inadequate excuse for unduly cramping it in the future; and if the Federal power has been unduly restricted, it is not an excuse for continued restriction.

Our adversaries, in their able and very lucid brief, have thought it advantageous to them to make copious citations of phraseology used in the course of the opinions and decisions of this court and of its members. We doubt if such citations always aid in reaching a sound conclusion. It is more helpful to use, as a compass, the underlying principle which determined the result.

This court, in each cycle of its existence, has been compelled to pass upon questions of gigantic national importance. It has not at all times been possible for the strong, the often exceedingly strong, judges who took part in the discussions of the consultation room, altogether to avoid, in the statement of their reasons, advocacy as well as logic. Whilst the decisions have ever been those of the just judge, the opinions, to some extent, at least, have occasionally been argumentative.

In Leisy *vs.* Hardin, 135 U. S., 110, it was held that the article in controversy, ardent spirits, was "subject to exchange, barter and traffic, like any "other commodity, in which a right of traffic ex- "ists, and are so recognized by the usages of the "commercial world, the laws of Congress and the "decisions of courts;" but that "articles in such "a condition as tend to spread disease are not mer- "chantable, are not legitimate subjects of trade and "commerce, and the self-protecting power of each "State, therefore, may be rightfully exerted against "their introduction, and such exercise of power can- "not be considered a regulation of commerce, pro- "hibited by the Constitution."

In that case it was decided that—

> Whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits directly or indirectly the receipt of an imported commodity, or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general Government, and is therefore void.

In that case this court did not decide how far the States could go in regulating health and in protecting against imposition and deceit. In Plumley *vs.* Massachusetts, 155 U. S., 461, however, the power of the State to protect its citizens against deception was fully sustained. To this case, in another part of this argument, fuller reference will be made.

The Supreme Court of Pennsylvania did not deem it necessary to put its decision, sustaining the Act of 1885, upon the police power because of its opinion (see Appendix)—

That a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another State, and sends them to his own agent in that State for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title.

There can be no doubt that the "original package" may be made sufficiently small to enable any forbidden article of meat or drink, in its most minute subdivisions, to be sold to the ultimate consumer. It is not necessary to amplify the thought so well presented by Mr. Justice Williams in the opinion filed on behalf of the Supreme Court of Pennsylvania. It is printed in the Appendix, and counsel for the Commonwealth will be content, without amplification of the argument in that particular, merely to discuss the question to the extent that the police power of the State is involved.

Our adversaries have advanced five propositions upon which they rest their appeal: (1) Oleomargarine is a universally-recognized article of commerce; (2) no State can forbid the sale within its limits of oleomargarine to such extent as the same, remaining in the "original package," was manufactured in another State; (3) all State regulations of the sale of

oleomargarine, to such extent as the same was manufactured in another State, and remains in the "original package," are presumptively illegal, because of their regulating commerce; (4) the Act of Congress of 2d August, 1886, furnishes ample protection to the citizens of the various States against deception in, and injury from, the sale of oleomargarine; and (5) no State can forbid the sale of oleomargarine to such extent as the same was manufactured in another State, even after the "original pack-"age" has been broken.

Under three of these five heads of proposition, we will place some of the statements by which the appellants seek to support them, and will add our comments.

Appellants' Proposition 1.—OLEOMARGARINE IS A UNIVERSALLY-RECOGNIZED ARTICLE OF COMMERCE.

They say (page 15) :—

> The traffic and trade in oleomargarine are clearly such as not only admit of but require one uniform system or plan of regulation, for it is manufactured in only a few of the states, while the demand and market for it exist everywhere. It is indisputably a commercial commodity.

It is difficult to see how, or why, there should be, or can be, but "one uniform system or plan of regu-"lation." There is no reason why oleomargarine should be manufactured in "only a few of the "States." If, however, it can only be thus manufactured, there is no reason why an inspection and

regulation necessary to secure the exclusion of injurious ingredients and to prevent fraud, should be confided to the officials of the States in which the manufacture is conducted, nor even to officials of the United States, who have no duty to perform in the way of conservation of the health of the citizens of the various States. We will deal later, with the assertion about the article being "indisputably a "commercial commodity."

The appellants (page 17) say :—

> In each of the cases at bar, it was established that all the requirements of the act of Congress had been complied with, and this reasonably implies the finding that the oleomargarine did not contain ingredients deleterious to the public health in the absence of all proof to the contrary.

In view of the fact that the Act of Congress does not require that any package must be inspected by an official of the United States, no inference can be drawn from the finding, that the Act of Congress had been complied with, as to the nature of the ingredients. There was no proof that the ingredients of the particular packages sold by the appellants were "deleterious to the public health," because the Legislature of Pennsylvania, acting within what this court has held to be its province, had determined that the article itself was either injurious to the public health, or was calculated to deceive the consumers as to its nature. In the Powell case, this court sustained a refusal to permit the vendors of

oleomargarine to prove, in contradiction of what was declared in the Act of Assembly, that the particular lots sold by them were not unwholesome. After a legislature, in the exercise of its power, in good faith, has determined, that of which its determination is conclusive, that an article is unwholesome, the prosecuting officers of the Commonwealth are not obliged to prove as a fact what cannot be disputed.

The appellants (page 18) say :—

> Oleomargarine has been a constant source of litigation and innumerable cases concerning it have been before the courts; but in no case has it ever been established that as an article of food, if properly manufactured, it was deleterious or injurious to health. The only ground assigned in support of the decisions sustaining the various stringent enactments seeking to fetter the trade has been deception in fraudulently selling oleomargarine for butter, and the only evil complained of or aimed at was successful competition with butter. The fact that oleomargarine as recognized and taxed by the Act of Congress is a legitimate article of food in general use, must be deemed conclusively established; certainly so in the absence of proof to the contrary. And it is not doubted that the court will take judicial notice of the fact as a matter of common and scientific knowledge, that oleomargarine is not injurious to health.

It will be observed that the appellants do not contend that oleomargarine is not "deleterious or "injurious to health;" but merely that "if properly "manufactured" it is not. Not thus contending, they really admit, that oleomargarine is injurious, or healthful, according to the method of its manufacture; and that what they call "the commercial article,"

oleomargarine, in merchantable condition, is not necessarily wholesome. What they contend is only that a merchantable article of oleomargarine, *if properly manufactured*, is wholesome. The great staples of life, corn, wheat, sugar, &c., if in merchantable condition, are wholesome. This so-called "com-"mercial commodity," however, is not. Examination of the product itself will not disclose the fact of its unwholesomeness, even though it exists, inasmuch as it may result from ingredients whose character can only be determined by chemical analysis.

It is conceded that there is a universal fear of "deception in fraudulently selling oleomargarine "for butter." We will endeavor to show, hereafter, that the chance of such deception rests upon the fact that oleomargarine, in the very method and course of its manufacture, is made to imitate butter in appearance, for the purpose of being sold as butter. Whatever be the labels, marks, numbers and envelopes ordered to be put upon oleomargarine, the ultimate consumer takes it from the confectioner in the shape of cakes or candies, from the cook in the shape of soups and sauces, and from the hotel or boarding-house keeper in the shape of a little plat, denuded of coverings, looking, when it has not been converted into something else, like butter.

It is hardly possible for the court to take judicial notice of the fact, "as a matter of common and scien-"tific knowledge, that oleomargarine is not injurious

"to health." The utmost breadth of fact of which it can take notice is, that it may be so made as not to be injurious to health; but that it will be extraordinarily difficult, if not impossible, to insure such making.

The appellants (page 20) say:—

> In the Pennsylvania cases at bar, the State could not and did not dispute the wholesome character of oleomargarine properly manufactured.

The prosecuting attorney of the Commonwealth did dispute such character, and relied upon what was conclusive as to the fact, viz., the determination by the legislature of its unwholesome character.

The appellants (page 21) quote from Tiedeman's Limitations of Police Power to the effect that:—

> Although there has been some attempt made to show that this butter substitute is unwholesome as food, it seems now to be established by the most thorough chemical analyses that there is no unwholesome ingredient in unadulterated oleomargarine.

We may presume that the appellants, in producing, on behalf of oleomargarine, credentials of good character, have supplied the best within their power. Do they go very far in that direction when they quote Tiedeman, to the effect that oleomargarine, manufactured in the best possible, and perhaps practically impossible, way, has been shown by chemical analysis to contain no unwholesome ingredient? Unfortunately, the consumer, when the article is presented

to him, is unable to make the necessary "chemical "analysis." If what is furnished to him be the "un- "adulterated oleomargarine" of the imagination, he may not be injured. How is he to be assured that this is the nature of what is supplied to him? By way of further credential, (page 21), the appellants quote from the report of the Commissioner of Internal Revenue to the effect that—

> Oleomargarine, carefully and properly prepared, is a healthful article of diet, and a wholesome substitute for butter.

Again we call attention to the fact thus made to appear, not that the article itself is necessarily wholesome, but that if the best possible method of preparation be pursued it can be so made.

The quotation by appellants (page 21), from Professor Caldwell, to the effect that "under such restric- "tions it seems to me that the trade in this article "might safely be left to itself," affords but little assistance, in the absence of any disclosure of what that gentleman regards as necessary restrictions.

The appellants (page 22) say :—

> It would be an extraordinary contention that oleomargarine is not, at the present time, a legitimate and recognized article of commerce, when nearly every State of the Union now regulates and permits its sale. The regulations in many instances are unreasonable and needlessly severe; yet the fundamental fact remains that almost every State recognizes oleomargarine as a commercial and wholesome commodity and expressly permits its sale as such.

"Regulations, in many instances unreasonable "and needlessly severe," establish the fact that oleo-

margarine, as such, is neither wholesome, nor non-deceptive, nor recognized as an article of commerce; but that, under regulations which may or may not be effective in producing desired results, it is permitted by most of the States to be sold.

The dividing line of legality, drawn by the appellants, is between legislation which prescribes "unreasonable and needlessly severe" regulations, and legislation which, because of the impossibility, under any regulations, to insure the necessary result of safety, forbids the sale of what, unless successfully regulated, is practically conceded to be unwholesome and deceptive. The Massachusetts Act, which the appellants admit to be legal and almost praiseworthy, does not prohibit the sale of oleomargarine "in a "separate and distinct form and in such manner as will "advise the consumer of its real character, free from "coloration or ingredient that causes it to look "like butter." We will endeavor to show, hereafter, that the oleomargarine of so-called "commerce," never advises "the consumer" of its real character, and is never "free from coloration or ingredient "which causes it to look like butter."

The appellants (page 22) say:—

> When it is found that this proviso (in the Massachusetts Act) appears almost word for word in the legislation of seventeen other States, and that in the legislation of twenty-one States, where this provision is not found, sales are permitted under regulations against deception, the conclusion would seem to follow, as of course, that the article has a legitimate

commercial character and that a State can not, by the mere declaration of its will, take away that character and ordain that it shall no longer be an article of commerce.

The certificate of character, not ruthlessly to be "taken away," given by the legislation referred to, is to the effect that oleomargarine, manufactured and sold in such way as advises the consumer of its real character, free from anything that causes it to look like butter, is permitted to be sold by seventeen States; but that it is not, under the legislation of twenty-one other States, permitted to be sold, because of its liability to deceive as to its character, saving under "more or less stringent regulations," the nature and extent of which the appellants are perhaps wise in not stating. Can it be that an article is a "commer-"cial commodity," whose character is so bad that thirty-eight States feel compelled to guard against its unwholesomeness and likelihood to deceive? How many States have felt compelled, because of the inadequacy of any regulations, to prohibit *in toto* its sale?

The appellants (page 34) say :—

Moreover, it is a notorious fact, within the common knowledge of every one, that oleomargarine is a valuable commercial commodity, in use all over the world as an article of food.

In view of what is said elsewhere by the appellants, we may take it that the oleomargarine which is "a valuable commercial commodity" is an ideal oleomargarine, prepared by honest persons, in the

best possible way, under the closest possible supervision of manufacture.

The appellants (page 38) say:—

> The case of Powell *vs.* Pennsylvania (decided in April, 1888) is distinguished from the cases at bar * * * for the reason that the basis of the decision was the assumption of fact "under the circumstances disclosed in the record" that "most kinds of oleomargarine butter in the market con-"tain ingredients that are, or may become, injurious to health." There is no proof whatever of this fact in the cases at bar, and the progress in science and manufacture has made it impossible that any such fact should be true at the present time.

We concede it may be difficult, perhaps impossible, to prove, concerning all the oleomargarine forced upon the citizens of the United States, that it contains ingredients which are, or may become, injurious to health. The only method of proof, as we have heretofore contended, would be a practically impossible chemical analysis. Because of the difficulty, and almost impossibility, of proof, of a fact which must always be apprehended, each State has the right, according to the judgment of its legislature, to protect its citizens by regulations, or, if it deems this insufficient, by prohibition. The argument is not a strong one which seeks to undermine a basis of fact, heretofore acted upon by this court, by the suggestion that "there is no proof whatever "of any such fact (injuriousness to health) in the "cases at bar." This court having decided that proof of the condition of the particular article sold by the indicted vendor is inadmissible, the fact of

lack of any proof, "in the cases at bar," is not difficult to understand.

The question of whether or not the public health can be conserved sufficiently by regulations "unreasonably and needlessly severe," or whether it can only be conserved by prohibition, is necessarily a legislative one. The necessity of regulation being conceded, if such regulation be not sufficiently conservative of health, must not the legislatures of the various States be allowed to determine the proper remedy for the evil?

Appellants' Proposition 3.—ALL STATE REGULATIONS OF THE SALE OF OLEOMARGARINE, TO SUCH EXTENT AS THE SAME WAS MANUFACTURED IN ANOTHER STATE, AND REMAINS IN THE ORIGINAL PACKAGE, ARE PRESUMPTIVELY ILLEGAL BECAUSE OF THEIR REGULATING COMMERCE.

Under this head the appellants (page 30) say:—

When a State legislature acts within its sphere of local concerns every reasonable presumption is indulged by this court in favor of the validity of the enactment; and it is now the settled rule of constitutional exposition that if a State, in enacting any law, may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support the law is presumed. But no such presumption can be indulged when State legislation, *prima facie*, affects and encroaches upon commerce among the States. Then it must appear clearly and affirmatively that the local regulation is grounded in some fair necessity for the exercise of the police power, and is a necessary provision for

the protection of the community. It must be conclusively established, if an article be excluded, that it "no longer belongs "to commerce, or, in other words, that it is not a commercial "article." The protection or guaranty of the Federal Constitution is *general*, affecting the people of all the States; the police power of the State is *special*, affecting only the people of one State; and consequently, whenever it appears, *prima facie*, that the special power encroaches upon the general power, the presumption must be in favor of the latter. Were it otherwise, the result would minimize the value of the Federal pledge of freedom of commerce and vastly extend the power of the States.

There is a concession by the appellants that there may be "local regulation," in the case of oleomargarine, if it "is grounded in some fair ne- "cessity for the exercise of the police power and is "a necessary provision for the protection of the "community." Without local regulation, no legislature permits its sale. Even under the contention of the appellants, oleomargarine is, or is not, a commercial article, according to the manner of its manufacture. Does it not follow, as an inevitable sequence, that if any legislature finds, or thinks it finds, regulation insufficient for the necessary purpose of protection, it can prohibit?

We repudiate the idea that any legislation by the States, in legitimate exercise of a conceded police power, is presumptively illegal and is subject to the condition of proof of the absolute necessity of the regulation or prohibition. The remedy for the evil is within the judgment of the legislature, which judgment, if not fraudulently but hon-

estly exercised, is not only presumptively, but conclusively, valid.

We fail to find any citation by the appellants, of any decision of this court, holding legislation, honestly enacted within the limit of the legislative power, to be subject to any disfavoring presumption. The burden is upon those who set up legislation, to show it to be within the power of the tribunal enacting it; but after showing this, in the absence of fraud or necessary inference of dishonesty, it must be held to be valid.

Under the appellants' theory in this respect, it will be difficult to sustain any State inspection or regulation laws, so far as they affect imported articles. In the Plumley case, this court, under this view, should have held, in the absence of evidence that the Massachusetts Legislature was not maliciously instigated, that the regulation it sustained was bad.

The appellants (page 31) say :—

> When the State legislature attempts to reach out and encroach upon matters *prima facie* within the exclusive sphere and domain of the National Government, upon the ground that the health or morals or safety of the community demands prohibitive legislation, it is not only a reasonable but a proper and essential safeguard that the State should be required to establish this public necessity. If presumptions are to be indulged, it must be in favor of free and untrammeled commerce. When a State prohibits all traffic in an article of commerce, and thus clogs commercial intercourse among the States, it *prima facie* encroaches upon the domain of the National Government, and should be prepared, in every such case, to establish that the commodity it excludes is not a legitimate article of commerce—

not merely according to its local or provincial view or prejudice or interest, but according to national views and national needs. This court must ever finally adjudicate upon the merits of the question thus raised.

The State Legislature, in the present case, has not attempted "to reach out and encroach upon matters "*prima facie* within the exclusive sphere and domain "of the National Government." It has not discriminated against the manufactures or products, of any other State. It has provided for the health of its own citizens, within the limits of what has been conceded by this court to be its power. It has not sought to interfere with commerce. There can be no pretext that the legislation, to which exception is taken, was enacted with any intent to interfere with commerce, or with any other intent than to protect the citizens of Pennsylvania against an unwholesome article and deception. The title of the statute is: "An Act for the protection of the public "health and to prevent adulteration of dairy prod-"ucts and fraud in the sale thereof." There is no physical reason why oleomargarine cannot be manufactured in Pennsylvania. It has been expressly held by this court that the State is under no obligation "to establish the necessity" of its legislation. There is no foundation, in decisions, for the assertion of the appellants, that the necessity of protecting the public in its health and against deception does not exist, in the case of a particular product, equally, whether manufactured in the State in which it is

found, or in another. The Act of 1885 is not an Act levelled against "traffic in articles of commerce" between the States. It is one local in its character, enacted by a legislature to which was intrusted the duty of conservation of the health of all the citizens of the locality. Its "necessity" exists irrespective of the place of origin of the prohibited article. The citizens of Pennsylvania may refuse to buy oleomargarine, and though producers in other States will still have the untrammeled right to send the same into Pennsylvania none will be likely to be sent, and commerce in such article will be diminished. In like manner, the Legislature of Pennsylvania, having a right to condemn the sale of an unwholesome or of a deceptive article within its limits, it will not, by so condemning, illegally interfere with commerce, though a condition of affairs may result which will lead to the loss of any market for the article.

The appellants (page 34) say :—

> If the legislatures of the States could, in the exercise of their police power, finally determine what articles are, and what are not, lawful subjects of the commerce power, the commerce of the nation would be completely at the mercy of the States.

We concede that if the legislatures of the States are permitted, under pretext of exercising their police power, to discriminate against imported articles, whether coming from other States or from foreign countries, there will be disunion instead of union. We contend, however, that where, in their

judgment, an article—certainly such an article as oleomargarine—is deemed unwholesome or deceptive, there is need to exercise their police power; that the exercise of this power will not regulate commerce; and that the soundness, or unsoundness, of the legislative judgment is not supervisable in any court.

It can hardly be presumed that a State "is med-"dling with a matter confided to the National Gov-"ernment," where, treating all persons alike, it condemns as unwholesome and deceptive, an article such as oleomargarine, requiring, of necessity, regulation of its manufacture and sale. There is a vast difference between a determination of "what articles are, "and what are not, lawful subjects of the commerce "power," and the determination, by each State, of what is necessary for the protection of its citizens from imposition and injury to health.

The appellants (page 40) say :—

> The police power of a State can, of course, be exerted to prevent deception and fraud; but the utmost extent to which deception may reach in some cases can never justify the prohibition of an article not at all deceptive. This Act prohibits sales of an article not calculated or intended to deceive, not colored in imitation of butter, manufactured under precautions and methods which now insure its wholesomeness, under the supervision of Federal officers, whose duty it is to prevent deleterious ingredients, and sold under regulations which absolutely preclude the idea of deception in the sale. If any one is deceived by oleomargarine in its natural form into eating it for butter, neither the manufacturer nor the dealer, wholesale or retail, is at fault. * * * It is submitted that,

under the American form of government and Constitutional rights of individual liberty, no person can be denied the privilege of manufacturing a legitimate article of trade or food and honestly selling it in another State for what it really is, without fraud or deception.

The appellants rely upon the labels and envelopes of their ten-pound packages, as "absolutely precluding the idea of deception in the sale." The confectioner, purchasing this article with knowledge of its character, in selling it again in a converted shape to his customers, absolutely ignorant thereof, concerns himself but little about labels and coverings which, long before his customers swallow it, disappear. The people innumerable, who live in boarding houses and in hotels, are furnished with oleomargarine, clear of all explanatory labels and coverings. A very large percentage of this article consumed, must be consumed by those to whom no warning is given by the labels, &c., affixed under the Act of Congress.

No United States officials are stationed at the various manufactories of this article. There is, and there can be, no practical supervision of the ingredients used, nor of the methods of manufacture. At best, all that can be done by the United States officials will be, occasionally, to make a chemical analysis of a particular lot. Infinitely the larger percentage of what is sold, will reach the ultimate consumers without any other protection than that accorded by the honesty and unselfishness (?) of the manufacturer.

We will endeavor to show, hereafter, that oleomargarine is so manufactured that it resembles butter, in order that the ultimate consumer, who sees no labels or tags, may be deceived.

Appellants' Proposition 5.—NO STATE CAN FORBID THE SALE OF OLEOMARGARINE TO SUCH EXTENT AS THE SAME WAS MANUFACTURED IN ANOTHER STATE, EVEN AFTER THE "ORIGINAL PACKAGE" HAS BEEN BROKEN.

The appellants (pages 25–6–7) say:—

> But it was not held, and this court has never held, that the breaking of bulk deprives the articles of the protection and benefit of the commerce clause. It has never been decided that the commerce clause protects only the dealer at wholesale and that States are at liberty to prohibit the sale at retail of recognized and legitimate articles of commerce, imported from other States or other countries, so soon as the bulk of the original package is broken. * * * This misconception is that the commerce clause protects only so long as the article remains unbroken in the original package of interstate commerce, and ceases to protect the contents when the package is broken. * * * The question as to whether or not an article is a subject of lawful commerce, and the converse question as to whether or not an article is a subject of a lawful exercise of the police power, cannot depend upon its form or casual quantity. An article, commercial in its nature, as determined by reference to commercial usage, does not lose this natural character at any time.

The idea underlying these assertions is, that an article which, at one time, was transported from one State into another, may be sold in the latter State, in contravention of the police regulations thereof, not only by the original importer, but by all subse-

quent grantees, not only in its "original package," but in any subdivisions thereof which may become necessary in the course of retail trading.

We do not deny that the proposition, as the appellants put the same, is logically consistent with the position they assert, and which it is necessary for them to maintain. Of course there is no decision which sustains it. On the contrary, the decisions are fatally adverse. We are very sure, however, that the appellants appreciate the necessity, by way of protection to their business, of recognition of their advanced proposition.

Health laws deal with things. The appellants refuse, however, to recognize that what is unwholesome, if it has its origin in the State in which it is finally found, will be not less unwholesome, though it once had a *habitat* in another State.

It is not difficult to see why they make their almost startling suggestion as to sales in broken, or new, packages. Under the United States statute, the retailer is obliged to sell from the original package; but, in the ordinary course of trade, he must break the same and must sell to his retail customer, the smaller parcels contained therein. It is this retail trading they desire this court to protect. They therefore claim that State legislation is violative of the commerce clause of the Constitution if it provides against selling oleomargarine by retailers, in smaller parcels, taken from the original package. Their theory is, that imported goods do not really

form part of the mass of property in the State in which they are found until after they are consumed.

If it be the duty of the States, not only to permit articles to be brought into them, but to promote their sale by treating as void all health legislation, then the appellants may be right in their contention that in the most minute subsequent divisions of the original package, the smallest retailer is clear of all sanitary provisions. If this very advanced argument prevails, a certain class will hereafter regard the commerce clause of the Constitution with the favor once accorded to an "*alibi.*" The criminal laws of the several States must fall as illegal, if foreign poisons and foreign cartridges be used.

In view of the citations by the appellants themselves, of decisions of this court, holding that the commerce clause does not protect an import after the breaking of the original package, we will not waste time in endeavoring to meet their proposition.

Having considered the main positions maintained by the appellants, and having made our comments thereon, we will now state those upon which the Commonwealth of Pennsylvania relies, in addition to the one dealt with by the learned Justice of its Supreme Court:—

I. The wholesomeness of oleomargarine is dependent upon the method of its manufacture. It cannot be ascertained by any superficial examination thereof.

II. Any certainly effective supervision of the method of its manufacture is impossible.

III. Olemargarine is manufactured to imitate, in its appearance, butter, with a view to deceiving the ultimate consumer as to its character.

IV. Deception of the ultimate consumer as to its true nature cannot be avoided by coverings, labels or marks.

V. Owing to its deceptive appearance and to its unwholesomeness, unless manufactured in a way which cannot be assured, the Legislature of Pennsylvania was justified in protecting its citizens against oleomargarine by prohibiting its sale.

VI. Oleomargarine is a newly-discovered article which is only permitted by the United States and (with a very few exceptions) by the States of the Union, to be dealt in under the most severe regulations.

VII. In the State of Pennsylvania, for the last twelve years, after a brief period of effort to guard against fraud and unwholesomeness in the manufacture and sale of oleomargarine by regulation, it has been deemed necessary, because of the impossibility otherwise to protect the citizens thereof, absolutely to prohibit any dealing therein.

VIII. Each State has a right, in the case of a newly-invented food product, to determine for its citizens the question of whether it is wholesome and non-deceptive. Neither the Congress of the United States nor the legislatures of other States can deprive it of this right.

IX. Oleomargarine does not belong to the class of universally-recognized articles of commerce. Not being within this class, the legislation of Pennsylvania does not affect commerce.

X. Non-discriminative legislation, enacted in good faith for the protection of health, and the prevention of deception, not hampering the actual transportation of merchandise, is not presumptively void but is conclusively valid.

I. The wholesomeness of oleomargarine is dependent upon the method of its manufacture. It cannot be ascertained by a superficial examination thereof.

The first part of this proposition is established by the fact, admitted by the appellants, that practically all the States, except those (number not stated by them) which have altogether forbidden the use, have been compelled to protect their citizens by "regula-"tions in many instances unreasonable and need-"lessly severe."

In vol. IV. of the Encyclopædia Brittanica it is said :—

> Pure oleomargarine butter is said to contain every element that enters into cream butter and to keep pure much longer; but there is the defect of not knowing when it is pure or what injurious ingredients, or objectionable processes, may be used in its manufacture by irresponsible parties.

The article concludes thus :—

> We append a comparative analysis of natural and artificial butter, which shows, that when properly made, the latter is a wholesome and satisfactory substitute for the former.

In Powell *vs.* Pennsylvania this court stated a fact which has probably never been denied antecedently to the filing of the appellants' brief in this case, viz., that "most kinds of oleomargarine butter in the mar- " ket contain ingredients which are, or may become, " injurious to health."

The second part of this proposition is self-evident. A defect in the process of manufacture is not disclosed by the appearance of the manufactured article.

II. Any certainly effective supervision of the method of manufacture of oleomargarine is impossible.

This proposition is one nearly self-evident. It will be impossible for the officials of any State into which oleomargarine is likely to be sent, to devise, for the protection of its citizens, an inspection at the place of manufacture, of the methods of manufacture of the article which is so to be sent. Within the boundaries of the State, where the manufacturing is to be done, it will be impossible to detail a corps of officials, sufficiently large, sufficiently honest, and sufficiently intelligent, satisfactorily to supervise the methods of preparation.

An article which is wholesome or unwholesome, according to the method of its manufacture, is so dangerous that prohibition, rather than precaution is the only real safeguard.

III. Oleomargarine is manufactured to imitate, in its appearance, butter, with a view to deceiving the ultimate consumer as to its character.

In vol. IV. of the "Encyclopædia Britannica," in the article upon "Oleomargarine," after describing the method of obtaining the butter oil, it is said :—

Much of the oil is exported to Europe in this way, there to be churned with milk into artificial butter. If properly sealed up, it will keep an indefinite period. It is of a light-yellow color and an agreeable taste, melting in the mouth like butter. When churned, it is mixed in the proportion of four hundred and forty-two parts oleomargarine, one hundred and twenty parts milk, thirty-seven and one-half of butter and one and three-quarters ounces bicarbonate of soda. This is churned from five to ten minutes, some coloring matter added, and then churned from thirty to forty minutes longer. The substance produced resembles butter in taste and appearance, though it has a tendency to crystallize and become lumpy.

The article further states :—

In view of the extensive and growing sale of this substance in the United States as cream butter, restrictive laws have been passed by several of the States, and the better to prevent fraudulent sales, Congress has recently passed a stringent law taxing the manufacture and sale. * * * Sold for what it is, oleomargarine is not likely to interfere greatly with the dairy business of this country, as it will be used mainly for cooking purposes.

In vol. XVII. of the "Encyclopædia Britannica," is to be found an extract from a report by Mr. Drummond, secretary of the British Embassy to Washington in 1880, in which the method of obtaining the oil is described. The writer adds :—

This oil, which on cooling freezes into a semi-solid fat, constitutes oleomargarine, and is recommended as an excellent

substitute for melted butter. Of the oil, considerable quantities are worked up into imitation butter. For this purpose it is violently churned up with milk for about twenty minutes, a little annotto being added to produce a yellow color. The emulsion is run direct on a mass of pounded ice to cause it to solidify without crystallization. After having been again churned up with fresh milk, it is kneaded to remove the excess of water, salted (in short, manipulated as genuine churned butter is), and sent out into the market.

In vol. II. of the "Encyclopædia Britannica," concerning annotto, it is said .—

Amongst civilized communities its principal use is for coloring butter, cheese and varnishes.

In the "Century Dictionary," the method of obtaining the oil is given. It is then said :—

This substance has been largely used as an adulterant of butter. When oleomargarine is churned in a liquid state with a certain proportion of fresh milk, a butter is produced which mixes with it, while the buttermilk imparts a flavor of fresh butter to the mass, making it so perfect an imitation that it can scarcely be distinguished by taste from fresh butter.

In the Act of 2d August, 1886, there is the following definition of oleomargarine :—

All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, &c.; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto and other coloring matter, intestinal fat and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter, or for butter.

In People *vs.* Arensberg, 105 N. Y., 131, Judge Rapallo refers to the testimony of two chemists to the effect that :—

> It was a golden yellow color, which was the color of natural butter, and that the natural color of oleomargarine fat was pure white. Another witness for the prosecution, a chemist, who stated that he was familiar with butter and with oleomargarine, testified that the natural color of oleomargarine was a pearly white, a creamy white, and that without any artificial coloring it did not resemble butter.

The slightest familiarity with this article discloses the fact that its color, by some artificial means, is made to resemble that of butter. In its natural color it never appears in the hands of a dealer. The whole object of the churning, of the admixture of color and of the flavoring, is to destroy its own appearance and to give to it that of butter. Those who manufacture it, know that its sale would be most seriously interfered with, if presented to the consumer in its own, uninviting, shape.

The appellants (page 39) put this illustration :—

> Suppose, by way of illustration, that a State whose soil was adapted to the growth of wheat, but not of corn, should, in order to protect its wheat growers, enact that, because corn is largely used in the manufacture of bogus and adulterated sugar, the sale of corn as an article of food be prohibited ; or that Vermont, in order to protect its maple sugar crop, should prohibit the sale of all sorghum sugar ; or that Pennsylvania should prohibit the sale of bran flour because it is used to adulterate mustard.

The soil of Pennsylvania is quite as well adapted to the manufacture of oleomargarine as is that of

any other State. Schollenberger, one of the appellants, is the agent of a manufacturer of Providence, R. I., the soil of which is certainly no better adapted than is that of Pennsylvania to the manufacturing of this compound. Though corn may be "largely used in the manufacture of bogus sugar," it is also a perfectly wholesome article of commerce, which is mainly used for legitimate purposes. A parallel with the case of oleomargarine would be, not that put by the appellants in illustration, but that of a product so manufactured in imitation of the appearance of corn as, inevitably, to deceive purchasers.

In the second annual report of the Dairy and Food Commissioner of Pennsylvania, there is a paper by the Chemist of the Department, who quotes, in connection with a statement of the analysis of articles sold as oleomargarine:—

The following formulæ, taken from a recent issue of the *Druggists' Circular*, gives a good idea of the nature of these preparations:—

	Parts.
Annatto seed, bruised	10
Turmeric	3
Ammonium carbonate	1
Cottonseed oil	75
Lard	10

Extract of annatto	10	ounces
Turmeric	5	ounces
Logwood chips	2½	ounces
Cottonseed oil	1	gallon

The manufacturers of oleomargarine are now, however, employing coal-tar colors, and among these "methyl orange" seems to be most frequently used. The detection of special coal-tar colors when mixed with other materials is rather difficult, not only because the high coloring power of these bodies enables a very small quantity to be used, but also because it is sometimes difficult to separate them from the substance with which they are mixed.

IV. Deception of the ultimate consumer of oleomargarine, as to its true nature, cannot be avoided by coverings, labels or marks.

This court, and other courts, have found the necessity of protecting trade marks, not in the fact that wholesale, or even retail, dealers are deceived as to the origin of the imitating goods, but because these dealers are often not unwilling to buy a cheap article with knowledge, and to sell it to those ignorant of its real character. The injury to the owners of such trade marks has been found to result from the deception practiced upon the ultimate consumer.

Though the guards surrounding wholesale and retail dealing be sufficiently great, which we doubt, to prevent selling otherwise than in marked packages, there can be no protection to those who consume the article, converted into cakes, confectionery or cooked food, or as it is found upon the table. The ultimate consumption is by parties who never see the coverings, labels or marks. The persons who will be injured, because of their being the consumers of the unwholesome, or deceptive, article, are afforded no protection.

V. Owing to its deceptive appearance, and to its unwholesomeness, unless manufactured in a way which cannot be assured, the Legislature of Pennsylvania was justified in protecting its citizens against oleomargarine, by prohibiting its sale.

This court, in Plumley *vs.* Massachusetts, 155 U. S., 462, has asserted, in the most unequivocal language, the right of a State to protect its citizens, by prohibiting the sale of an article deceptive in its appearance.

It is true that the Massachusetts statute did provide against a prohibition of the manufacture or sale of oleomargarine "in a separate or distinct form, "and in such manner as will advise the consumer "of its real character, freed from coloration or in- "gredients that cause it to look like butter."

If the methods of manufacture of oleomargarine are correctly described in the standard authorities, no oleomargarine can be sold in Massachusetts, because none is "free from coloration or ingredients "that cause it to look like butter."

We do not think it will be denied that annotto, or some similar drug, is used to change the pallor of the intestinal fat, to the attractive yellow of dairy butter.

It is averred, in the title of the Pennsylvania statute, that it is enacted for the purpose of protecting from deception. The legislature was convinced that, owing to the artificial appearance given to all

known forms of oleomargarine, the article itself was necessarily deceptive.

In the Plumley case it was said (page 466) :—

Nor was the Act of Congress relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general Government is concerned, but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits. * * * Now the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce

the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those which may have become the subject of trade in different parts of the country?

This court took occasion to say, with emphasis, that it had never inquired whether a State, in the exercise of its police powers, might not protect the public against deception. Deception must necessarily result from the sale, within the limits of the State, as food, of a compound so prepared as to be made to appear to be what it is not.

In the Plumley case it was said (page 472):—

If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general Government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as was said by this court in Sherlock *vs.* Alling, 93 U. S., 99, 103: "In conferring upon Congress the regu- "lation of commerce, it was never intended to cut the States "off from legislating on all subjects relating to the health, "life and safety of their citizens, though the legislation might "indirectly affect the commerce of the country. Legislation, "in a great variety of ways, may affect commerce and persons "engaged in it without constituting a regulation of it within "the meaning of the Constitution. * * * And it may be "said generally that the legislation of a State not directed

" against commerce or any of its regulations, but relating to " the rights, duties and liabilities of citizens, and only indirectly " and remotely affecting the operations of commerce, is of ob- " ligatory force upon citizens within its territorial jurisdiction, " whether on land or water, or engaged in commerce, foreign " or interstate, or in any other pursuit."

Speaking of Leisy *vs.* Hardin, this court said (page 474):—

It must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a State is powerless to prevent the sale of articles manufactured in or brought from another State and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy and which is wholly different from what its condition and appearance import.

This court (page 475) quoted with approval what had been said in People *vs.* Arenberg, 105 N. Y., 123, to the effect that—

The statutory prohibition is aimed at a designed and intentional imitation of dairy butter, in manufacturing the new product, and not at a resemblance, in qualities inherent in the articles themselves and common to both.

The opinion concludes with this assimilation of law with morals (page 478):—

We are unwilling to accept this view. We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure

to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society; and the States are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of a more serious character. And this protection may be given without violating any right secured by the National Constitution, and without infringing the authority of the general Government. A State enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States. It is legislation which "can "be most advantageously exercised by the States themselves." Gibbons *vs.* Ogden, 9 Wheat., 1, 203.

We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the States to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and State authority. But in view of the complex system of government which exists in this country, "present-"ing," as this court, speaking by Chief Justice Marshall, has said, "the rare and difficult scheme of one general Govern-"ment, whose actions extend over the whole, but which pos-"sesses only certain enumerated powers, and of numerous "State Governments, which retain and exercise all powers not "delegated to the Union," the judiciary of the United States should not strike down a legislative enactment of a State—especially if it has direct connection with the social order, the health and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the National Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.

The Legislature of Pennsylvania at first tried to protect its citizens by regulations short of prohibition.

It failed. In an honest exercise of its duty to preserve them against deception, it found an article offered to them which had been purposely made to imitate dairy butter. Because this article was a fraudulent imitation, it forbade its sale.

This court has conceded the right, and the duty, of the State, through its legislature, to guard its citizens against deception. Will it say, in the case of an article necessarily deceptive, that its prohibition, because of its deceptiveness, is illegal? Had oleomargarine been offered to the public in its natural, and not in its imitative and disguised appearance, the necessity for legislation would have been greatly diminished. It is not fair to say, as the appellants do say, that the oleomargarine legislation was an effort on the part of the farmers to protect themselves against the sale of an article equally good. It resulted from a determination by those in power, to guard their citizens from deception as to the nature of an article sold under disguise, as to color and flavor, with the intent to deceive.

In Powell *vs.* Pennsylvania, 127 U. S., 685, it was said:—

> Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients,

are questions of fact and of public policy which belong to the legislative department to determine. * * * The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk to take the place of butter produced from unadulterated milk, will promote the public health and prevent frauds in the sale of such articles.

The appellants (page 9) say :—

The power of the States to regulate the sale of oleomargarine, to prevent artificial coloring calculated to deceive, to require labels to prevent deception, is not challenged. * * * This necessarily involves the broader question as to whether the police power can uphold State legislation which prevents and destroys interstate commerce in any article designed and fit to take the place of any other article of foods sold for what it is, without fraud or deception or imitation, and with full disclosure to the purchaser.

If regulations prove insufficient to punish deception, is not the power vested in the legislature broad enough to punish such deception, if it shall deem it necessary, by actual prohibition of sale?

Oleomargarine, according to the method of its manufacture, may be "fit to take the place of any "other article of food." It is certainly so "designed." The Legislature of Pennsylvania has determined that it is not "sold for what it is," without fraud or deception or imitation, and with full disclosure to the purchaser. In view of what is stated in the text

books, as to the method of manufacture, and the design and intention of the manufacturers, do not the appellants beg their premise, when they say that oleomargarine is sold "with full disclosure to "the purchaser for what it is?"

Oleomargarine cannot be sold in such way that, under the circumstances attending its ultimate consumption, "all possible fraud and deception" will be precluded.

VI. Oleomargarine is a newly-discovered article which is only permitted by the United States, and, (with a very few exceptions), by the States of the Union, to be dealt in under the most severe regulations.

Of course this proposition will be conceded.

VII. In the State of Pennsylvania, for the last twelve years, after a brief period of effort to guard against fraud and unwholesomeness in the manufacture and sale of oleomargarine by regulation, it has been deemed necessary, because of the impossibility otherwise to protect the citizens thereof, absolutely to prohibit any dealing therein.

So far as the citizens of Pennsylvania are concerned, its legislature has always refused to recognize the wholesomeness, or the freedom from deception, of oleomargarine. At first it sought to protect by regulation. In this it failed. It then prohibited simply to protect its citizens in their health and against fraud. In Pennsylvania there has never been an acceptance of oleomargarine as an article of commerce.

VIII. Each State had a right, in the case of a newly-invented food product, to determine for its citizens the question of whether it is wholesome, and not deceptive; neither the Congress of the United States, nor the legislatures of other States, can deprive it of this right.

Perhaps it will be conceded that if there be a *bona fide* apprehension of injury to health, any State may, in the first instance, prohibit the sale of a newly-invented food product. When will a prohibition, in the first instance legal, become illegal? Will the action of Congress or of other States, at a later period, make it such?

Preliminarily it may be said that the Act of 2d August, 1886, was never meant to legalize the dealing, within the limits of any State, in oleomargarine. It expressly extends and applies to persons engaged in the manufacture and sale of oleomargarine, section 3243 of the Revised Statutes, which provides:—

> The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State, or in places prohibited by municipal law.

It seems almost farcical to urge, that Congress has recognized oleomargarine, which it stigmatizes as an "imitation of butter," as a legitimate article of

trade or commerce, with the intent to strike down the legislation of the different States of the Union, in view of what it said in the words just quoted. It has practically said that the laws of the States which punish dealing in oleomargarine, are not to be affected by its enactment.

By the Act of Congress, 2d August, 1886, it is provided :—

> The Commissioner may also decide whether any substance made in the semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health.

Can there be a much more forcible recognition by Congress, of the necessity, for the prevention of injury to the public health, of the supervision of the manufacture? And yet, its officials will never be able properly to supervise the same. Can there be a much stronger recognition of the fact that oleomargarine, as it may, and as it probably will, be manufactured, is not properly an article of commerce?

As we have seen, scarcely a single State of the Union has been willing to recognize it as an article which may be safely or properly dealt in, excepting under extraordinary guards. Some legislatures have deemed one, other legislatures have deemed another, set of guards, necessary; but all have recognized the necessity of some guarding of the manufacture and sale. Is it possible for one State to dictate to another that the guards it deems sufficient shall be by it

adopted? Where all deem it necessary to do something, the extent of the doing must depend upon the judgment, in each case, of the legislature of each State affected.

Can the appellants point to any decision of this court, restricting a legislature in the exercise of its police power, over an article conceded by all to be dangerous, if not rigidly supervised and controlled?

Even if one State does determine that its citizens will be sufficiently protected in their health, and against deception, by the regulations by it prescribed, it is still open for any other State to determine whether its citizens will be protected by such regulations. It must be left unfettered in its exercise of its power to determine what shall be done.

Let us illustrate: Suppose that one-half of the States of the Union determine it to be necessary to prohibit the sale, for food, of an article just discovered and that the other one-half determine that official supervision and control will sufficiently protect their citizens, can Congress say that such an article is an article of commerce and that regulation, or prohibition, by the legislatures, because of its interference with commerce, will be illegal?

In the cases heretofore decided by this court, the articles involved, (one of them was whisky), were those which the whole civilized world had accepted, antecedently to the Federal Constitution, as articles of trade or commerce.

In the case of oleomargarine, a very different situ-

ation is presented. If all the States but one should prohibit its manufacture, because of their belief in its fraudulent and unwholesome character, could Congress declare it to be an article of commerce? Would the will of one State, manufacturing it, be allowed to overrule the determinations of all the others?

The power vested in Congress is to regulate commerce. No power is conferred upon it to determine what are articles of commerce, or to insist that newly-invented food products shall be treated as such.

In United States *vs.* Dewitt, 9 Wallace, 41, it was held that the section of the Internal Revenue Act of 1867, making it a misdemeanor, punishable by fine and imprisonment, to mix for sale, naphtha and illuminating oils, or to sell or offer such mixture for sale, &c., is, in fact, a police regulation, relating exclusively to the internal trade of the States, and that it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia; that within State limits, it can have no constitutional operation.

IX. Oleomargarine does not belong to the class of universally recognized articles of commerce. Not being within this class, the legislation of Pennsylvania does not affect commerce.

We have discussed this proposition almost as fully as we deem necessary, under some of the preceding heads.

In Leisy *vs.* Hardin, 135 U. S., 110, this court said:—

> Ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts.

Can this be said of oleomargarine?

In the same case, the Chief Justice further said (page 113):—

> Articles in such condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered as a regulation of commerce, prohibited by the Constitution.

Cannot the same thing be said of articles manufactured with the designed purpose of deceiving the public as to their nature? Of articles admittedly dangerous to health, unless manufactured with extreme care and honesty, and of articles universally recognized as those which must be carefully regulated in the method of their manufacture and sale?

In Scott *vs.* Donald, 165 U. S., 91, this court, through Mr. Justice Shiras, said:—

> So long, however, as State legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles. * * * It is important to observe that the statute before us does not

purport to prohibit either the importation, the manufacture, the sale or the use of intoxicating liquors. * * * In view of these and similar provisions, it is indisputable that whatever else may be said of this Act, it was not intended to prohibit the manufacture, sale and use of intoxicating liquors. On the contrary, liquors and wines are recognized as commodities which may be lawfully made, bought and sold, and must therefore be deemed to be the subject of foreign and interstate commerce.

As late as in Emert *vs.* Missouri, 156 U. S., 318, this court said, through Mr. Justice Gray :—

In the opinion of the majority of the court in 120 U. S., 498, delivered by Mr. Justice Bradley, it was expressly affirmed that a State, although commerce might thereby be incidentally affected, might pass "inspection laws to secure the due "quality and measure of products and commodities," and "laws to regulate or restrict the sale of articles deemed in- "jurious to the health or morals of the community."

In Guy *vs.* Baltimore, 100 U. S., 443, this court said :—

In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States.

X. Non-discriminative legislation, enacted in good faith for the protection of health and the prevention of deception, not hampering the actual transportation of merchandise, is not presumptively void, but is conclusively valid.

In answering a counter proposition by the appellants, we have said about all we care to say under this head.

The question is always one of power. Where that is found to exist, the judgment shown in its exercise can never be supervised.

Either the State legislatures do, or do not, possess the power to enact sanitary provisions for the protection of their citizens. It being conceded that they do possess such power, no exercise of the same, in the absence of fraud, can be held to be presumptively void. In the Powell case it was decided by this court that the legislative judgment upon the question of fact was final. The Legislature of Pennsylvania has decided that oleomargarine as manufactured, and as known to the public, leads to deception and is unwholesome. It is conceded that so far as regards the sale of products originating within its borders this judgment is final. Is it possible that it can be held to possess any different characteristic, because the product condemned may, in some instances, have originated in another State?

In the very recent case of Richmond and A. R. Co. *vs.* Patterson Tobacco Company, 18 Supreme Court Reporter, 335, this court held that:—

A State statute declaring that a common carrier accepting goods for transportation to a point beyond its own terminus assumes an obligation for their safe carriage to that point, unless otherwise provided by a written contract signed by the shipper, merely establishes a rule of evidence, and does not restrict the right of the carrier to limit his obligation by con-

tract, and hence is not, as applied to interstate commerce, a regulation thereof so as to be void under the Federal Constitution.

In that case it was said :—

Of course, in a latitudinarian sense, any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation on the contract itself. But this remote effect resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce.

We submit, in conclusion, that so long as this court continues to do what it has ever done in the past, viz., condemn all legislation designed to interfere with trade or commerce, no harm can result from reliance upon the judgment of the legislature of each State, concerning measures calculated to protect health and to prevent fraud.

JOHN G. JOHNSON,

For the Commonwealth of Pennsylvania.

APPENDIX.

I. SPECIAL VERDICT.

"(1.) The defendant, J. Otis Paul, is a resident and citizen "of the Commonwealth of Pennsylvania, and is the duly au- "thorized agent in the city of Philadelphia of Braun & Fitts, "of Chicago, Ill.

"(2.) The said Braun & Fitts are engaged in the manufac- "ture of oleomargarine in the said city of Chicago, and the "State of Illinois, and as such manufacturers have complied "with all the provisions of the Act of Congress of August 3d, "1886, entitled 'An Act defining butter, also imposing a tax " 'upon and regulating the manufacture, sale, importation and " 'exportation of oleomargarine.'

"(3.) The said defendant, as agent aforesaid, is engaged "in business at No. 214 Callowhill Street, in the city of Phila- "delphia, as wholesale dealer in oleomargarine, and was so "engaged on the second day of October, 1893.

"(4.) The said defendant, on the first day of July, 1893, "paid to the Collector of Internal Revenue of the First District "of Pennsylvania the sum of $480, as and for a special tax "upon the business, as agent for Braun & Fitts Company, in "oleomargarine, and obtained from said collector a writing "in the words following:—

"Stamp for		Special Tax
"$480	United States	$480
"Per Year.	Internal Revenue.	Per Year.
"No. A 431.		No. A 431.

"Received from J. Otis Paul and Geo. E. Paul, agents for "the Chicago Butterine Co., the sum of four hundred and

"eighty dollars, for special tax on the business of wholesale "dealer in oleomargarine, to be carried on at 214 Callowhill "street, Philadelphia, state of Pennsylvania, for the period "represented by the coupon or coupons hereto attached.

"[SEAL] WILLIAM H. DOYLE,
"$480 *Collector First District of Pennsylvania.*

"Dated at Philadelphia, Pa., July 1st, 1893.

"The following clauses appear on the margin of the "above:—

"This stamp is simply a receipt for a tax due the govern- "ment, and does not exempt the holder form any penalty or "punishment provided for by the law of any state for carrying "on the said business within such state, and does not au- "thorize the commencement nor the continuance of such bu- "ness contrary to the laws of such state, or in places prohibted "by a municipal law. See section 3243, Revised Statutes "U. S.

"Severe penalties are imposed for neglect or refusal to place "and keep this stamp conspicuously in your establishment or "place of business. Act of August 2d, 1886.

"Attached to this were coupons for each month of the year, "in form as follows:—

"Coupon for special tax on wholesale dealer in oleomar- "garine for October, 1893.

"(5.) On or before the said second day of October, 1893, "the said Braun & Fitts shipped to the said defendant, their "agent aforesaid, at their place of business in Philadelphia a "package of oleomargarine separate and apart from all other "packages, being a tub thereof, containing ten pounds, packed, "sealed, marked, stamped and branded in accordance with the "requirements of the said Act of Congress of August 2d, "1886. The said package was an original package as re-

"quired by said Act, and was of such form, size and weight "as is used by producers or shippers for the purpose of se- "curing both convenience in handling and security in trans- "portation of merchandise between dealers in the ordinary "course of actual commerce, and the said form, size and "weight were adopted in good faith and not for the purpose "of evading the laws of the Commonwealth of Pennsylvania. "Said package being one of a number of similar packages "forming one consignment shipped by the said company to "the said defendant; said packages forming said consignment "were unloaded from the cars and placed in defendant's store "and there offered for sale as an article of food.

"(6.) On the said second day of October, 1893, in the said "city of Philadelphia at the place of business aforesaid, the "said defendant, as wholesale dealer aforesaid, sold to James E. "Crawford the said tub or package mentioned in the fore- "going paragraph, the oleomargarine therein contained re- "maining in the original package, being the same package, "with seals, marks, stamps and brands unbroken, in which it "was packed by the said manufacturer in the said city of "Chicago, Ill., and thence transported into the city of Phila- "delphia and delivered by the carrier to the defendant, and "the said tub was not broken nor opened on the said premises "of the said defendant, and as soon as it was purchased by the "said James E. Crawford it was removed from the said prem- "ises.

"(7.) The oleomargarine contained in said tub was manu- "factured out of an oleaginous substance not produced from "unadulterated milk or cream, and was an article designed to "take the place of butter and sold by the defendant to James "E. Crawford as an article of food, but the fact that the article "was oleomargarine and not butter was made known by the "defendant to the purchaser, and there was no attempt or pur- "pose on the part of the defendant to sell the article as butter

"or any understanding on the part of the purchaser that he "was buying anything but oleomargarine, and the said oleo- "margarine is recognized by the said Act of Congress of Au- "gust 2d, 1886, as an article of commerce.

"(8.) The above transaction specifically found by the jury "is one of many transactions of like character made by the "defendant during the last two years."

II. OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

It is not necessary to the decision of this case that we should enter upon the discussion of the existence and extent of the police power residing in the several States of the Union. It is quite unnecessary to argue that the power of Congress to regulate commerce between the citizens of the different States was not intended to abridge the lawful exercise of the police power by any of the State governments. If judicial decisions can be said to settle any question, these questions are clearly and properly settled by the decisions of the highest tribunal known to our laws; and settled in accordance with the rules laid down in this State since its first organization. In Commonwealth *vs.* Powell, 127 U. S., 678, the right of this State to deal, in the exercise of its police power, with the manufacture and sale of oleomargarine and the validity of the particular statute under consideration in this case were distinctly affirmed. During the last year (1894) a Massachusetts statute relating to the same subject came before the Supreme Court of the United States in Plumley *vs.* Massachusetts, 155 U. S., 461, and was sustained as a lawful exercise of the police power. The defendant in that case had, as the defendant in this case has, a license from the Internal Revenue Department of the United States authorizing him

to deal in oleomargarine. It was held, however, that this did not authorize him to engage in the manufacture or sale of oleomargarine in violation of the State laws lawfully passed forbidding or regulating such manufacture and sale. The dealer in articles which the State in the exercise of its police power places under restrictions, must make his peace with the State in which his business is conducted, as well as with the internal revenue laws of the United States. This proposition the defendant denies. He has made his peace with the tax laws of the United States, but denies the power of the State to regulate or restrict his sales of the commodity in which he deals, and asserts that he is engaged in interstate commerce within the true intent of the constitutional provision conferring upon Congress the power to regulate commerce between the several States.

In determining the question thus raised, it is important to keep in mind the facts found by the special verdict, as follows: 1. The defendant is a resident in and citizen of this State, with a store or place of business at No. 214 Callowhill Street, Philadelphia. 2. He is conducting the sale of oleomargarine as the agent for "Chicago Butterine Company," which is a firm or corporation doing business in Illinois, and is the licensed dealer at No. 214 Callowhill Street. 3. The oleomargarine was not made from milk or cream. It was designed to be used in place of butter. It was sent from Chicago to Philadelphia to be sold as food, and the tub sold to Crawford, which is complained of in this case, was sold to him for use as an article of food. 4. The tub contained ten pounds only, was put up, sealed and stamped at the factory in the State of Illinois, was received in the same form in Philadelphia, and then "placed in defendant's store and offered "for sale as an article of food." 5. This was one of "many "transactions of like character made by the defendant during "the last two years;" or, in other words, this was the way in

which the defendant did business for his non-resident principals, the manufacturers. They put up the article in ten-pound packages suited for the retail trade, and because they do not allow their agents to open or divide these, they treat their trade as wholesale, though in fact they supply the actual consumer and not the retail dealers. Looking now at these facts in the light of the cases cited we shall find every question raised by them has been decided against the defendant by the Supreme Court of the United States except one. The validity of our Act of Assembly has been distinctly affirmed as a lawful exercise of the police power. The fact that an internal revenue license affords the defendant no justification for disregarding a lawful exercise of the police power by the State is stated with equal clearness. The proposition that the judiciary of the United States should not strike down the police power of the States in the exposition of the interstate commerce powers of the general Government, was asserted and abundantly vindicated in Plumley *vs.* Massachusetts, *supra*, decided within the last year. Our statute is directed especially against the sale of oleomargarine as an article of food. The defendant, in willful and flagrant disregard of the letter as well as the spirit of the statute, keeps these tubs, of the commodity manufactured by his principals, at the store in Callowhill Street for sale "as an article of food." He offers them for sale for use as an article of food, and he sold to Crawford the ten-pound tub which is the ground of complaint in this case for use as food. Now, it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an original package within the proper meaning of that phrase. The non-residence of the manufacturer does not play any important part in this case, for he comes into this State to establish a "store" for the sale of his goods, pays the license ex-

acted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to customers. We have, therefore, a Pennsylvania store selling its stock of goods to its customers for their consumption, from its own shelves; and unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute.

We first encountered this question of: What shall constitute an original package within the meaning of our national interstate commerce legislation, in Commonwealth *vs.* Zelt, 138 Pa., 615. A non-resident manufacturer of intoxicating drinks put up his whisky and other liquors in quart and pint bottles adapted for use in the retail trade to consumers. These he sent to an agent in charge of a store rented for the purpose in Washington, Pa. The bottles were corked, some sealing wax put over the cork and the brand or initials of the manufacturer impressed thereon. The bottles so secured were then put in pasteboard boxes or covers, and packed in open boxes or barrels for shipment to the Pennsylvania store. When they were received at the store the bottles were arranged and displayed on the shelves and offered for sale to the consumer as original packages of whisky. Neither the distiller who shipped the whisky nor his agent who sold it had a license to sell intoxicating drinks under the liquor laws of this State, but made sales of whisky and beer by the pint and quart under the pretense that each bottle was an original package of commerce. The learned judge before whom an indictment against the seller of the bottles of liquor was brought to trial submitted the question to the jury whether this method of putting up the liquors in bottles was not adopted as a device to evade the liquor laws of this State. The jury found the fact to be that it was a mere device, and rendered a verdict of guilty. Upon an appeal to this court the ruling of the court below was affirmed, and in speaking on the second assignment of error

we said that whether whisky or beer could be put up in pint bottles and sold by the single bottle as an original package under the protection of the interstate commerce laws, was a question that would be decided when it was squarely raised. The question was next raised in Commonwealth *vs.* Shollenberger, 156 Pa., 201, and its decision became necessary to the disposition of that case. In that case a non-resident manufacturer of oleomargarine had established a store for its sale in Philadelphia and held a license under the internal revenue laws authorizing such sale. His agent sold a tub of "the "goods" to a boarding-house keeper for use in the place of butter on his table.

The defense was that the tub had not been broken or divided by the seller and was therefore an original package within the meaning of the interstate commerce cases. We held that the conclusion did not follow from the fact stated, and attempted to define an "original package" as such a package as was used in good faith by producers and shippers for convenience in handling and security in transportation of their wares in the ordinary course of actual commerce. But we also said that where the size of the package was adapted for the retail trade so that "breaking of bulk" was not necessary to "reduce the goods into the common mass" and fit them for the retail trade, the traffic so conducted was not interstate, but infrastate commerce, or, in other words, the common, every-day, retail traffic of the community in which the store was located. Let us look at the consequences of the adoption of the opposite rule. If a pint bottle of whisky is an original package under the protection of Congress, and can be sold as such regardless of the police legislation of the State, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce intended to guard against stoppage

along State lines for examination or the collection of customs duties, has been extended by construction until it is made to reach and protect a retail traffic carried on within any State, if the things sold have come into the retailer's store from a non-resident manufacturer or shipper. If this be a sound construction, then the power of a State to restrict or prohibit an injurious traffic does not depend on the deleterious character of the thing sold or the manner in which sales are made or the public or private injury inflicted by the sale, but on the manner in which the thing sold comes into possession of the seller. If he makes the article or buys it of another citizen of the State he cannot sell it without punishment. If he buys it of a non-resident, who sends it to him across the State line, he may sell it with impunity, and the State is powerless to stay his hands or to regulate his sales. A pint of whisky put up in a flask, if made or bought in this State, cannot be sold without a license granted by the courts after an examination into the character of the applicant and his business. The same flask of whisky put up across the border may come as an original package into any community and be sold to any person, whether a minor, a drunkard or a lunatic, under the protection of the Constitution of the United States.

We cannot adopt a construction that seems to us so unnatural and unreasonble, and that would work such absurd and monstrous results. On the contrary, we hold, as we think is held by the recent case of Plumley *vs.* Massachusetts, already referred to, that the mere fact that a police law may affect the trade in articles brought from another State does not amount to an attempt to regulate interstate commerce, or to an assumption of power belonging to Congress. Coming now to the facts of this case we find the alleged "original package of commerce" to be a small tub of oleomargarine containing ten pounds, and in fact sold to a consumer for use as an article of food upon his table. It is

true that the defendant treats his trade as one carried on at wholesale, but the facts of the special verdict show that this is not because he supplies dealers or sells in large quantities for shipment, but because he treats the little tubs and packages he sells his customers as "original packages of com-"merce," and his law-breaking traffic as "interstate commerce." He does not "break bulk" by taking one pound out of a package and weighing it on his scales for the supply of a customer, but requires him to take a whole tub, whether of ten pounds or of two or of one is immaterial, but it must be a whole package as it was put up at the factory. If the pint bottle or the pound package has not been opened and divided before the sale, the contention is that it has not become a part of "the common mass" of property entering into the ordinary business of the citizens of the State, but is an original package under the protection of Congress as interstate commerce. The question to which we are thus brought is the same that was encountered in Commonwealth *vs.* Schollenberger, 156 Pa., 201. It is, whether a package intended and used for the supply of the retail trade is an "original "package" within the protection of the interstate commerce cases?

We held in that case that a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another State, and sends them to his own agent in that State for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title. We are not dealing with the legislative question. Whether the trade in oleomargarine is injurious and should be restricted is a question that has been decided for us. It has been declared injurious. It has been placed under restrictions. These restrictions have been held to be a valid exercise of the police power both by this court and the Su-

preme Court of the United States. Our question is, whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages in another State, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate, interstate commerce, and set the police laws of the State at defiance. In disposing of this question we hold as follows: First, the character of the package, whether original or not, is a question of fact when there are facts to be passed upon bearing upon this question, and should go to the jury; second, it is a question of law when the facts are agreed upon, or presented by a special verdict as in this case, and should be decided by the court; third, it is fair to presume that a package was intended, by him who devised it, for the purpose for which he uses it in his own business; fourth, a package devised by a non-resident manufacturer, or put up by him adapted for sale at retail to individual consumers, such, for example, as a flask of whisky or a tub or pail or roll of oleomargarine, and actually sold by him or his agent to the consumer for use as an article of food or drink, in violation of the laws of the State where such sales take place, is not an "original package" within the meaning of the law relating to interstate commerce; fifth, the punishment of such sales under the police power of the State is not an interference with the powers of Congress or with the commerce between the States which is protected by the Constitution of the United States.

The judgment is reversed and judgment is now entered on the special verdict in favor of the Commonwealth. The record is remitted that sentence may be imposed according to law.

Reported in 170 Pennsylvania State reports, page 284.